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No. 649

In the Supreme Court of the United States

October Term, 1942.

MARGARET MASHUNKASHEY, NOW BRADSHAW,
Petitioner,
vs.
UNITED STATES OF AMERICA; A. G. WILLIAMS, GUARDIAN OF JAMES G. BLAINE, JR.; MAMIE MASHUNKASHEY, EXECUTRIX OF ESTATE OF BEN MASHUNKASHEY, DECEASED; AND L. M. COLVILLE AND JOHN W. KEITH, JOINT ADMINISTRATORS OF ESTATE OF PAH-PU-SON-TSA, DECEASED,
Respondents.

Petition for Writ of Certiorari, and Brief in Support Thereof.

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IN THE SUPREME COURT OF THE UNITED STATES.

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vs.

UNITED STATES OF AMERICA; A. G. WILLIAMS, GUARDIAN OF JAMES G. BLAINE, JR.; MAMIE MASHUNKASHEY, EXECUTRIX OF ESTATE OF BEN MASHUNKASHEY, DECEASED; AND L. M. COLVILLE AND JOHN W. KEITH, JOINT ADMINISTRATORS OF ESTATE OF PAH-PU-SON-TSA, DECEASED,

Respondents.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Margaret Mashunkashey, now Bradshaw, respectfully prays *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the Northern District of Oklahoma, which she asserts was entered without jurisdiction of the court, as the subject-matter involved is a controversy between citizens of the same state, relating to the individual interest

in real and personal property that vested in petitioner by operation of law upon the death of her deceased husband, Charles Mashunkashey, on June 10, 1934, which interest, under applicable law, is unrestricted.

Opinion Below.

The District Court filed no opinion. The decree appears (R. 39-42). The opinion of the Circuit Court of Appeals which does not appear in any published report, appears (R. 104-109).

The judgment of the Circuit Court of Appeals was entered October 16, 1942, rehearing denied December 9, 1942, and on December 15, 1942, conformable to the rules, said court, by order, stayed its mandate pending filing of instant proceedings within thirty days.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (chap. 225, 43 Stat. 938, 28 U. S. C. A. 347), and under Paragraph 5 (b), Rule 38 of this Court.

Questions Presented.

I. Whether the United States District Court for the Northern District of Oklahoma had jurisdiction to render a declaratory judgment in an action brought by the United States on its own behalf and on behalf of certain restricted full-blood members of the Osage Tribe of Indians involving only the interest of petitioner, a non-member of the Osage Tribe of Indians, in certain real and personay property which passed to and vested in petitioner, by operation of law, upon the death of her husband, Charles Mashunkashey, June 10, 1934, free of all restrictions.

II. Whether a release or agreement purporting to have been executed on behalf of petitioner, a non-member of the Osage Tribe of Indians, purporting for a cash consideration to release, discharge and acquit the estate of her deceased husband, Charles Mashunkashey, from any and all claims which she may have against said estate by reason of being the widow of said Charles Mashunkashey, or for any other reason or cause whatsoever, can form the basis of an action brought by the United States, as plaintiff, in the United States District Court for the Northern District of Oklahoma so as to confer original jurisdiction on said court of said action, when all the parties to said agreement are citizens and residents of the State of Oklahoma; and when said release or agreement is insufficient in law in the absence of fraud or mistake to constitute a conveyance of real estate, or to constitute a sale or an assignment of personal property.

III. There is also involved the application of Section 7, Act of Congress, February 27, 1925, (43 Stat. 1008) and also the validity thereof, to-wit:

(a) Whether said section has any application to the descent of the individual property of a deceased member of the Osage Tribe of Indians.

(b) Whether, if said section be construed to regulate the descent of the individual property of a deceased member of the Osage Tribe of Indians, said section is valid.

(c) Whether the Congress had the power to regulate the descent of the individual property of members of the Osage Tribe of Indians after the admission of Oklahoma into the Union.

Statutes Involved.

The statutes involved are set out in the Appendix hereto, at pages 30-31.

Summary Statement.

The jurisdiction of the federal court was sought to be invoked by the United States on behalf of itself and of Ben Mashunkashey, Pah-pu-son-tsa and James G. Blaine, Jr., full-blood Osage Indians, residents of Osage County, Oklahoma, commencing this action in the United States District Court for the Northern District of Oklahoma against petitioner, a resident of Tulsa County, Oklahoma (R. 9). The relief sought was a declaratory judgment based upon a written instrument (R. 16-17) decreeing petitioner had no further right, title and interest in and to the real and personal property that belonged to her deceased husband, Charles Mashunkashey, in his lifetime.

The bill (R. 9-17) as to jurisdictional facts and controversy involved is vague and indefinite. While the bill seeks a declaratory judgment decreeing an instrument (R. 16-17) valid and binding, based on the theory of settlement and accord and satisfaction, and that petitioner had no further interest in the real and personal property not described (R. 15) *(a)* it describes no property except in general terms, referring to property owned and possessed by Charles Mashunkashey, a full-blood Osage Indian, in his lifetime as restricted property; *(b)* it neither alleges nor asserts who the heirs of decedent are or who succeeded to his real and personal property; *(c)* it deraigns no title in itself or in its wards, nor does it assert facts from which title might be inferred; *(d)* it does not allege the Indian wards are heirs of decedent; *(e)* it does not allege or assert that the petitioner,

the surviving wife, did not succeed by operation of law to an interest in the property of decedent on his death, although by praying that she be decreed to have no further interest, it infers that she did succeed to some interest; *(f)* it neither asks the protection nor asserts the invasion of any right of the United States in the real and personal property vested in petitioner by operation of law; *(g)* it neither alleges nor asserts the instrument (R. 16-17) is sufficient to constitute a conveyance or assignment of the interest in said property that vested in petitioner by operation of law, nor that it was so intended; *(h)* it alleges no fraud committed against the United States or against the Indian wards for whose benefit the action was brought—it alleges no mistake; *(i)* it fails to assert that the property which vested in petitioner by operation of law was restricted, or any right or supervision of the government over that property which vested in petitioner by operation of law.

Petitioner filed a motion for a more definite and certain statement and bill of particulars (R. 18-20), overruled (R. 20-22); motion to dismiss and demurrer (R. 23-24), overruled (R. 29); answer, (R. 29-38); amended answer attacking jurisdiction of the court and right of United States to maintain the action (R. 38-39).

It was stipulated (R. 49) that Charles Mashunkashey died June 10, 1934, leaving surviving petitioner, as surviving wife, no issue, no father or mother, a half-brother, Ben Mashunkashey, a maternal grandmother, Pah-pu-son-tsa, and that James G. Blaine, Jr., was of no blood relation.

Decedent, Charles Mashunkashey a full-blood Osage Indian, executed certain wills during his lifetime (R. 49) one being a will devising all his property to petitioner except $10 devised to Ben Mashunkashey, (copied R. 101-102). The

will was not approved by the Secretary of the Interior during the lifetime of decedent and was therefore ineffective.

May 16, 1936, petitioner (R. 91) employed Inghram D. Hook, an attorney, to represent her before the Secretary of Interior to have will approved. Pending rehearing before Secretary of Interior, negotiations were entered into between Mr. Hook and attorneys for Indian wards, being a conference at Pawhuska, but no settlement was agreed upon (R. 79). Correspondence was carried on through Department of Interior (R. 53-61). Department, on March 10, 1938, (R. 60) advised the only matter pending before it was the approval or disapproval of wills, also that any agreement made would have to be between the parties themselves, the only authority Department had was to approve or disapprove any agreement they might enter into (R. 70). Hook never discussed any settlement with petitioner except directing a letter to himself (copied R. 50) and forwarding same to Mr. Duncan, an attorney at Tulsa, Oklahoma, to have petitioner execute (R. 83). Petitioner, on being called, went to Mr. Duncan's office—no one was present to explain said letter to her, and she executed it (R. 99-100). Mr. Hook thereafter in presence of Departmental attorneys at Washington dictated an instrument and Mr. Flanery, Departmental attorney, caused to be inserted "catch-all" clauses, to-wit: "Or for any other reason or cause whatsoever." (R. 66) Mr. Hook, without submitting writing to his client but requesting they deal directly with him (R. 76) executed the instrument as her attorney, being the release (R. 16-17). The instrument, through Department, was then forwarded to Mr. Campbell and other attorneys with the right to make suggestions or to be more definite and certain or to cover additional subjects (R. 67). Said attorneys and clients ac-

cepted instrument as submitted, subscribed to same and returned it to Department where it was thereafter approved. Up to said time no administrator had been appointed, although a special administrator had (R. 63). Thereafter Mr. Walker and Mr. Taylor were appointed joint administrators (R. 84) and received $15,000 from Department and made application to court for permission to pay said sum to petitioner and obtained an *ex parte* order (R. 85). Application and order appear (R. 86-87). Administrators executed check (photostat, R. 27) in sum of $15,000.00 to Margaret Mashunkashey and Inghram D. Hook with endorsement thereon that it was in settlement of claims against estate. Check was delivered to Mr. Hook (R. 85). A controversy arose between Hook and petitioner before check was endorsed (R. 85, 93); Mr. Hook for himself and associates taking $10,000.00 and petitioner $5,000.00 (R. 96). Petitioner testified (R. 92) as follows:

> "My understanding was, I appointed Mr. Hook to get my will approved. I was accepting this money under the will, that was my understanding. I wouldn't try to appoint administrator."

This testimony is uncontroverted.

The controversy between Ben Mashunkashey, Pah-puson-tsa and James G. Blaine and petitioner which it is sought to have adjudicated herein arose as set forth in the bill of complaint (R. 13) by a petition being filed in County Court of Tulsa County in *Matter of Estate of Charles Mashunkashey, Deceased,* to determine his heirs; petitioner filed her pleading asserting she was surviving wife and an heir and asked to be so decreed. The three Osage Indians above named filed answer thereto, setting up the release and claiming that by reason of said instrument petitioner

was estopped from claiming and asserting any interest in the property; they also set up the further contention that petitioner was not of Indian blood and precluded from inheriting. County Court (R. 14) held it had no jurisdiction of controversy as to effect of release, as same was an independent transaction between Ben Mashunkashey, as an heir to a portion of estate, and Pah-pu-son-tsa and James G. Blaine who were not heirs on the one side, and petitioner, surviving spouse and an heir on other side; and not a controversy within the probate jurisdiction of County Court. Appeal was taken to District Court and said court advised it would hold as County Court had that it had no jurisdiction to adjudicate controversy between Ben Mashunkashey, Pah-pu-son-tsa and James G. Blaine on one side and petitioner on other relating to the release. Based on said facts, the United States alleged there was a controversy between itself and petitioner and sought a declaratory judgment (R. 15). Prior to trial the administrators of estate of Pah-pu-son-tsa, executrix of the will of Ben Mashunkashey and guardian of James G. Blaine intervened and were made parties by adopting petition of United States (R. 47).

The District Court held in favor of the government and against petitioner (R. 39-42). On appeal to the Circuit Court of Appeals, the judgment of the District Court was affirmed by an opinion (R. 104-109) without determining whether the controversy involved restricted property, but in effect, and contrary to the prior decisions of this court that the jurisdiction of the federal court was limited to restricted property, extended the jurisdiction to unrestricted property.

Specification of Errors to Be Urged.

The United States Circuit Court of Appeals for the Tenth Circuit erred:

I. In holding that the United States had authority to maintain said action.

II. In holding that the United States District Court for the Northern District of Oklahoma had jurisdiction of the subject-matter of said action, for the following reasons, to-wit:

(a) The succession to and the devolution of the real and personal property of decedent, Charles Mashunkashey, was controlled by the laws of the State of Oklahoma.

(b) Petitioner, as the surviving wife of Charles Mashunkashey, deceased, upon the death of said decedent, succeeded to and became vested immediately with an interest in and to the real and personal property owned by said decedent at the time of his death.

(c) Said interest in the real and personal property of said decedent, Charles Mashunkashey, to which petitioner succeeded and with which she became vested as the surviving wife of said deceased, was unrestricted and free from governmental control.

(d) The United States District Court for the Northern District of Oklahoma had no jurisdiction of the action, and had no jurisdiction to decree that petitioner had no interest in the unrestricted property that vested in her by operation of law, because no diversity of citizenship existed between the parties to said action.

III. In holding that an attorney, employed to obtain approval by the Secretary of the Interior of an Indian will,

had authority to barter away her unrestricted interest in the property that vested in petitioner by operation of law.

IV. By indirectly holding that Section 7 of Act of February 27, 1925, (43 Stat. 1008) governed the succession to and the devolution of the individual property of an Osage Indian, or, if applicable, in sustaining the power of Congress after statehood to regulate the descent of the individual property of Osage Indians.

Reasons Relied Upon for Allowance of Writ.

Petitioner herein shows that the decree and opinion complained of in sustaining the right of the United States to maintain an action upon behalf of Indian wards and confer jurisdiction upon the federal court of a local controversy involving no federal statute or rights created thereunder between citizens of the same state, the subject-matter of which relates to unrestricted property, free from control of the government, is of great public importance. While the courts have heretofore sustained the right to maintain such actions upon behalf of Indians and confer jurisdiction on the federal court where the subject-matter involved was restricted property, however where the property was unrestricted as in the case at bar, jurisdiction has always been denied.

Wherefore, petitioner respectfully prays that a Writ of *Certiorari* issue to the United States Circuit Court of Appeals for the Tenth Circuit.

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